

DATUK KIM KOK KHIN

A

v.

TAN AH TONG

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA

B

DAVID WONG DAK WAH JCA

MOHD ZAWAWI SALLEH JCA

[CIVIL APPEAL NO: W-02-1483-06-2012]

12 DECEMBER 2013

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CIVIL PROCEDURE: *Specific performance - Agreement for sale of house - Parties entered into sale and purchase agreement in 1974 - Deposit paid by purchaser - Title deed of house issued in 1983 but purchaser came to know of issuance in 2004 - Purchaser lodged caveat on title deed and informed seller of willingness to pay what was lawfully due under agreement - No respond from seller - Claim for specific performance of agreement against seller - Whether action barred by limitation*

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CIVIL PROCEDURE: *Limitation of action - Agreement - Claim for specific performance of sale and purchase agreement of house - Preliminary issue of limitation decided in case management - Whether issue of limitation could be re-opened at trial - Rules of the High Court 1980, O. 14A*

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CIVIL PROCEDURE: *Summary application - Rules of the High Court 1980, O. 14A - Preliminary issue - Limitation of action - Trial judge decided issue under O. 14A but reversed finding at close of trial - Whether decision made under O. 14A final and could be re-opened during trial - Objective of O. 14A - Whether trial judge erred in reversing earlier decision - Whether trial judge bound by earlier findings*

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The appellant had purchased a bungalow from the respondent through a sale and purchase agreement ('the agreement') dated 2 May 1974 during which 10% of the purchase price was paid ('the deposit'). On 17 May 1974, the respondent demanded for the balance of the purchase price to be paid within seven days of the completion date of the sub-division of the land. However, the appellant did not make any payment. Subsequently, the respondent terminated the agreement on 3 June 1974 and proceeded to inform the appellant that the deposit had been

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- A forfeited. The appellant paid the balance of the purchase price on 17 June 1974 which was duly accepted by the respondent. The respondent then requested for the sum of RM7,040 from the appellant as part of the development costs. Due to non-payment of the development costs, the respondent threatened to terminate
- B the agreement again on 25 September 1974. The appellant requested for the title deed to the bungalow and confirmation of the development costs by the surveyors but the respondent did not entertain the appellant's request. The title deed was issued on 3 May 1983 but the appellant alleged that he came to know of
- C the issuance on or about December 2004. Then, the appellant lodged a caveat on the title deed and informed the respondent that he was ready and willing to pay what was lawfully due under the agreement. However, the respondent did not respond and the appellant proceeded to claim for specific performance of the
- D agreement at the High Court. During case management, the Judicial Commissioner ('JC') directed that the issue of limitation could be decided as a preliminary issue under O. 14A of the Rules of the High Court 1980 ('RHC'). The JC found in favour of the appellant and the issue of limitation raised by the respondent was
- E dismissed. However, at the close of the trial, the JC dismissed the appellant's claim on the ground that the suit was barred by the Limitation Act 1953. Hence, the present appeal. The appellant's main contention was whether the JC was legally correct in allowing the issue of limitation to be re-opened at the trial despite
- F the fact that it was already decided as a preliminary issue in an application under O. 14A of the RHC.

Held (allowing appeal with costs)

Per David Wong Dak Wah JCA delivering the judgment of the court:

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- (1) The whole purpose of O. 14A of the RHC is to ensure that cases can be expeditiously disposed of by allowing questions of law or construction of any documents to be disposed summarily. In this manner, expenses and delay would be
- H minimised. It does not mean that any decision under O. 14A was not a final decision and could be re-opened at trial. Therefore, the JC had erred in reversing her earlier decision on the issue of limitation of the appellant's cause of action as she
- I was bound by her earlier finding. (paras 19 & 20)

- (2) The appeal was allowed with costs in the cause and the matter was remitted back to the High Court for re-trial on the premise that the appellant's cause of action was not time-barred. The reason for remitting the matter back was because there had been mistrial as the appellant had been prejudiced by the JC's change of mind. The deposit was ordered to be refunded to the appellant. (paras 22-24)

Bahasa Malaysia Translation Of Headnotes

Perayu telah membeli sebuah banglo daripada responden melalui satu perjanjian jual beli ('perjanjian tersebut') bertarikh 2 Mei 1974 yang mana 10% daripada harga belian telah dibayar ('deposit'). Pada 17 Mei 1974, responden menuntut agar baki harga belian dibayar dalam masa tujuh hari dari tarikh siap pecah bahagian tanah tersebut. Walau bagaimanapun, perayu tidak membuat sebarang bayaran. Seterusnya, responden menamatkan perjanjian tersebut pada 3 Jun 1974 dan memaklumkan kepada perayu bahawa deposit telah dirampas. Perayu kemudiannya membayar baki harga belian pada 17 Jun 1974 yang mana diterima oleh responden. Responden kemudiannya meminta sejumlah RM7,040 daripada perayu sebagai sebahagian daripada kos pembangunan. Akibat tiada bayaran bagi kos pembangunan, responden mengugut untuk menamatkan perjanjian sekali lagi pada 25 September 1974. Perayu memohon surat ikatan hakmilik bagi banglo tersebut dan pengesahan kos pembangunan oleh juruukur tetapi responden tidak melayani permohonan perayu. Surat ikatan hakmilik dikeluarkan pada 3 Mei 1983 tetapi perayu mendakwa bahawa dia mendapat tahu mengenai pengeluaran tersebut pada atau lebih kurang Disember 2004. Perayu memasukkan kaveat ke atas surat ikatan hakmilik dan memaklumkan kepada responden bahawa dia bersetuju dan sanggup membayar apa yang terhutang dalam undang-undang di bawah perjanjian tersebut. Walau bagaimanapun, responden tidak membalas dan perayu meneruskan untuk menuntut bagi pelaksanaan spesifik perjanjian di Mahkamah Tinggi. Semasa pengurusan kes, Pesuruhjaya Kehakiman ('PK') mengarahkan bahawa isu had masa boleh diputuskan sebagai isu awalan di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). PK memutuskan berpihak kepada perayu dan isu had masa yang dibangkitkan oleh responden ditolak. Walau bagaimanapun, semasa penutup perbicaraan, PK menolak tuntutan

- A perayu atas alasan bahawa guaman perayu dihadkan oleh Akta Had Masa 1953. Oleh itu, rayuan ini. Hujahan utama perayu adalah sama ada PK bertindak dengan wajar di bawah undang-undang dalam membenarkan isu had masa dibuka semula semasa perbicaraan walaupun ia telah diputuskan sebagai isu awalan dalam permohonan di bawah A. 14A KMT.
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Diputuskan (membenarkan rayuan dengan kos)

Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

- C (1) Tujuan A. 14A KMT adalah untuk memastikan bahawa kes-kes boleh diselesaikan dengan segera dengan membenarkan persoalan fakta atau pembentukan mana-mana dokumen diselesaikan secara ringkas. Dengan kaedah ini, perbelanjaan dan kelewatan boleh dikurangkan. Ia tidak bermakna bahawa sebarang keputusan di bawah A. 14A bukanlah keputusan muktamad dan boleh dibuka semula semasa perbicaraan. Oleh itu, PK terkhilaf dalam mengakas keputusan awalnya mengenai isu had masa kausa tindakan perayu kerana beliau terikat dengan dapatan awalnya.
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- E (2) Rayuan dibenarkan dengan kos dalam kausa dan perkara tersebut dikembalikan semula kepada Mahkamah Tinggi bagi perbicaraan semula atas alasan bahawa kausa tindakan perayu tidak dihadkan oleh had masa. Alasan bagi pengembalian semula perkara tersebut adalah akibat terdapat perbicaraan silap kerana perayu diprejudiskan oleh penukaran fikiran PK. Deposit diperintahkan agar dipulangkan semula kepada perayu.
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Case(s) referred to:

- G *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 CA (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 14A

- H *For the appellant - WSW Davidson (KY Foo & Foo Siew June with him); M/s KY Foo & Co*

For the respondent - K Goik; M/s Nasir Kenzin & Tan

[Appeal from High Court, Kuala Lumpur; Suit No: S4-22-329-2007]

- I *Reported by Najib Tamby*

JUDGMENT**A****David Wong Dak Wah JCA:****Introduction**

[1] This is an appeal against the decision of the High Court in which the learned Judicial Commissioner dismissed the appellant/plaintiff's claim against the respondent/defendant for specific performance of an agreement dated 2 May 1974 on the ground that the claim is barred by the Limitation Act 1953.

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[2] We heard the appeal and after giving due consideration to respective counsel's submission and record of appeal we allowed the appeal with costs.

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[3] The respondent has now obtained leave to appeal to the Federal Court and to facilitate that appeal we now give our reasons.

D**Background Facts**

[4] The appellant had purchased a bungalow from the respondent through a sale and purchase agreement dated 2 May 1974 ("the agreement") during which 10% of the purchase price was paid.

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[5] On 17 May 1974, the respondent demanded for the balance of the purchase price to be paid within seven days in view of the completion of the subdivision of the land. No payment was made by the appellant.

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[6] On 3 June 1974, the respondent terminated the agreement and informed the appellant that the 10% deposit had been forfeited. However on 17 June 1974, the appellant paid the balance of the purchase price which was duly accepted by the respondent's solicitors.

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[7] On 13 August 1974, the respondent pursuant cl. 8(c) of the agreement requested for the sum of RM7,040 as part of the development costs. In view of non-payment of this development costs, the respondent on 25 September 1974 threatened to terminate the agreement again.

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A [8] In response to that threat, the appellant on 27 September 1974 requested for the title deed and confirmation of the development costs by the surveyors. The respondent did not respond to that request.

B [9] On 3 May 1983, the title deed to the bungalow was issued and it is alleged that the appellant only knew of the issuance of the title on or about December 2004. Pursuant to this discovery, the appellant lodged a caveat on the title deed of the bungalow. On 17 November 2006, the appellant informed the respondent that he was ready and willing to pay what is lawfully due under the agreement.

C [10] In view of the non-response of the respondent, the appellant took this legal action to claim for specific performance of the agreement.

D **High Court Decision**

E [11] Before we set out what was decided by the High Court, we must set out what had happened prior to the final judgment dated 30 May 2013 as the appellant's main complaint relates directly to that event.

F [12] This case came out for case management on 22 February 2012 before the learned Judicial Commissioner who directed with the consent of respective counsels that the issue of limitation be decided as a preliminary issue under O. 14A of the Rules of the High Court 1980.

G [13] Pursuant to that direction, respective counsels made their submissions and from the cursory reading of those submissions, it is quite clear that the learned Judicial Commissioner was faced with the sole issue of whether the appellant's statement of claim is time barred by the Limitation Act 1953.

H [14] On 6 April 2012, the learned Judicial Commissioner found in favor of the appellant and this is evident in her notes which reads as follows:

application permohonan oleh Defendan berhubung isu had masa permohonan ditolak.

I [15] The effect of this dismissal is simply that the appellant's statement of claim is not barred by Limitation Act 1953. The judgment of that decision was extracted in a form of a sealed order by the appellant.

[16] The trial started on 9 April 2012 and completed on 30 May 2012 with the delivery of the court's decision and the grounds of the learned Judicial Commissioner. A

[17] In her grounds, the learned Judicial Commissioner made certain findings which in our view were in favour of the appellant and in her last paragraph, she found that the appellant's suit is barred by the Limitation Act 1953. She found that time started to run on 25 September 1974 which is the letter demanding for payment of the development costs of RM7,040 and in view of this action having started in 2007, twelve years had elapsed and hence time barred. B C

Our Grounds Of Decision

[18] The main ground of the appellant's appeal is simply whether the learned Judicial Commissioner was legally correct to allow the issue of limitation to be reopened at the trial despite the fact that she has decided on this issue as a preliminary issue in an O. 14A application. D

[19] The whole purpose of O. 14A is to ensure that cases can be expeditiously disposed of by allowing questions of law or construction of any documents to be disposed summarily. In this manner, expenses and delay would be minimised. That said, it does not mean that any decision under O. 14A is not a final decision and can be reopened at the trial. E F

[20] This is made clear in the case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57 where this court held as follows:

- (1) Once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the Court and all parties to the lis until its reversal on appeal. The decision of the Judge overruling the Respondent's preliminary objection rendered the point taken *res judicata* (see pp 65G and 66H); *Government of Malaysia v. Dato Chong Kok Lim* (1973) 2 MLJ 74 followed and *Harrison v. Harrison* (1955) 1 Ch 260 distinguished. G H

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A (2) A failure to adhere to the principle of *res judicata* may lead to chaos in the conduct of the civil proceedings. In this case, on the assumption of the law made by counsel before the Court, there would be re-review his second decision reversing himself. The process could then be repeated *ad finitum* with no conclusion (see p 66E).

B [21] Accordingly we find that the learned Judicial Commissioner had erred in reversing her earlier decision on the issue of limitation of the appellant's cause of action. She is bound by her earlier finding.

C **Conclusion**

D [22] For reasons stated above, we allowed the appeal with costs in the cause and ordered that this matter be remitted back to the High Court for retrial on the premise that the appellant's cause of action is not time barred for reasons elaborated by us above.

E [23] Our reason for remitting the matter back is simply that it is our view that there has been mistrial as the appellant had been prejudiced by the learned Judicial Commissioner's change of mind. In short justice demands that this matter be remitted back to the High Court. Further, the appellant's counsel had expressed no objection to this course of action.

F [24] Finally we order that the deposit to be refunded to the appellant.

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